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(I)



In the Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 514, 515

ROBERT L. MEYER, AS ADMINISTRATOR, ETC., ET AL.,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

*ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1179-1191) is reported in 113 F. (2d) 387.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered June 12, 1940 (R. 1192). A motion for rehearing was denied July 23, 1940 (R. 1209). The petition for writs of certiorari was filed October 17, 1940. The jurisdiction of this Court is invoked under Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in an action to condemn land pursuant to the Act of April 24, 1888, and the Act of August 30, 1935, the United States is authorized to condemn a fee where the Secretary of War has determined that a fee is necessary.

2. Whether the United States is liable for damage to land caused by raising the waters of a navigable stream permanently to ordinary high-water mark.

STATUTES INVOLVED

The Act of April 24, 1888, c. 194, 25 Stat. 94, 33 U. S. C. § 591, provides:

The Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; * * *

The Act of August 30, 1935, c. 831, 49 Stat. 1028, 1034, 1035, provides:

Be it enacted that the following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized, to be prosecuted under the direction of the Secretary of War and supervision of

the Chief of Engineers, in accordance with the plans recommended in the respective reports hereinafter designated and subject to the conditions set forth in such documents; * * * Mississippi River between Missouri River and Minneapolis; * * * Illinois waterway, Illinois; House Documents Numbered * * * 184, Seventy-third Congress;¹ * * *

STATEMENT

The United States filed its petition in the District Court for the Southern District of Illinois to condemn the fee to 2,476 acres of land owned by petitioners for use in connection with a dam on the Mississippi River, called Lock and Dam No. 26 (R. 2-45). This dam, located just below the confluence of the Mississippi and Illinois rivers, creates a pool which extends up both of the rivers. Since the pool is several feet above the natural ordinary high-water level, the closing of the dam had inundated riparian land in both the Mississippi and Illinois River valleys. The improvement, of which Lock and Dam No. 26 is a part, was authorized by the Act of August 30, 1935 (c. 831, 49 Stat. 1028, 1034, 1035). The condemnation proceeding was instituted at the request of the Secretary of War, who advised the Attorney General that creation of the pool required acquisition of the fee to petitioners' land (R. 6, 64). Petitioners

¹ Other congressional documents are referred to in this Act, but are not relied upon by petitioners.

filed a cross petition asking damages for alleged injuries to the balance of their lands which the Government did not seek to condemn (R. 158-161).

In the course of its charge the trial court instructed the jury as follows (R. 1017-1018):

I now direct you to another matter, namely, the claims of the defendant owners [petitioners] relative to the direct damage due to said dam and pool which may be suffered by their lands and improvements not taken and that surround and adjoin said seven tracts taken.

Therefore, I further charge you that it is fully established that the said Lock and Dam No. 26, located in the Mississippi River at its site at Alton, is capable of holding and raising the natural elevation of the waters of the Mississippi River at the dam site at Alton to a maximum elevation of 419 feet above sea level; also, that it is capable of creating a pool behind said dam and constantly maintaining that pool at 419 feet elevation at Alton. * * *

You are further instructed that under the Constitution of the United States, and the amendments thereto, providing for just compensation to be paid to the owners for private property taken for public use, that such just compensation consists of not only a just award for the value of the property which is actually taken, but also for an award for any and all damage that may directly result to the portions of the tract and the valuable improvements thereon that

remain, where that portion that remains is a part of the same tract which the Government takes away from the owner, * * *

Concerning the question of damages caused by the raising of the water of the river up to the ordinary high water mark, the Government is not liable. However, for damages caused a riparian owner from the raising of the water above the high water mark, it is liable. Therefore, it is only such damages as are caused by the raising of the water levels above high water mark that the Government must make recompense or reparation.

Petitioners excepted to the last paragraph quoted (R. 1019-1020).

There was a verdict for \$66,750 as compensation for the land taken and for the damage to the remaining land (R. 1125-1134) and judgment was entered accordingly (R. 1142-1152). The Circuit Court of Appeals affirmed (R. 1192-1193).

ARGUMENT

1. Petitioners attack the Government's authority to acquire a fee to their lands. The Act of April 24, 1888, empowered the Secretary of War to cause the institution of proceedings to condemn "any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers". Thus Congress confided to the Secretary of War the determination of what lands or interest in lands were necessary

for the maintenance of Lock and Dam No. 26. *United States v. Certain Lands in Town of Narragansett*, 145 Fed. 654 (D. R. I.). In the absence of bad faith, his decision that a fee to petitioners' lands was necessary is conclusive. *Shoemaker v. United States*, 147 U. S. 282, 298; *United States v. Gettysburg Electric Ry.*, 160 U. S. 668, 685; *Barnidge v. United States*, 101 F. (2d) 295 (C. C. A. 8th).

Petitioners contend (pp. 8-13, 16-17, 24-25, 27-28, 35-37), however, that the Act of August 30, 1935, limited the Secretary of War to the acquisition of flowage easements. The contention is without substance. The unqualified authorization of the 1888 Act is not touched by the direction of Congress in the 1935 Act that the authorized work is to be prosecuted "in accordance with the plans recommended in" the House Documents mentioned and "subject to the conditions set forth" in those documents. The references to "flowage," "flowage damage," and "flowage easements," quoted (pp. 11-13) by petitioners from House Document No. 184, fall far short of establishing a modification of the authority conferred upon the Secretary by the 1888 Act. House Document No. 184 discussed the proposed improvements from an engineering and commercial standpoint. It did not deal with the manner in which the lands necessary therefor were to be acquired or with the interest in such lands which would be needed.

Petitioners also assert (pp. 4-5, 14-16, 36) that if the Secretary of War had authority to determine what title was necessary, his determination in the present instance was made in bad faith and constituted an abuse of discretion. However, as the court below held (R. 1181):

The evidence in the record, including that tendered by defendants, tends to disclose only a difference in judgment as to the necessity of a fee simple title,—nothing in the way of abuse of discretion. Furthermore in their cross complaint defendants averred that the possession of the Government “would completely destroy” the lands “by the operation of the dam.” If there was a complete taking or destruction of defendants’ property, *it would seem obvious that a fee simple title was requisite.* [Italics supplied.]

2. Unquestionably, as petitioners state (pp. 17-18), the exercise by Congress of its authority to improve navigation is subject to the prohibition of the Fifth Amendment against the taking of private property for public use without just compensation. *United States v. Lynah*, 188 U. S. 445, 465, 471; *United States v. Cress*, 243 U. S. 316, 319-320. Petitioners are also correct in saying (pp. 18, 25-26, 36-37) that the compensation to be awarded under the Fifth Amendment for an actual physical taking of part of a tract of land includes not only the value of that which is taken but also the dam-

age resulting to the remainder from such taking. *United States v. Grizzard*, 219 U. S. 180, 183; *United States v. Chicago, B. & Q. R. Co.*, 82 F. (2d) 131, 134-136 (C. C. A. 8th); *United States v. Chicago, B. & Q. R. Co.*, 90 F. (2d) 161, 167-168 (C. C. A. 7th), certiorari denied, 302 U. S. 714. As has been shown (pp. 4-5), the trial court so instructed the jury.

These principles, however, give no support to petitioners' contention (pp. 7, 8) that the trial court erred in further instructing the jury that the United States was not liable for damage caused to petitioners' remaining land by the maintenance of the river level at the ordinary high-water mark. Petitioners cite no case so holding and we have found none. Land below the high-water mark is subject to a servitude for navigation. *Willink v. United States*, 240 U. S. 572, 580. Intangible riparian rights are subject to the same servitude. Thus compensation need not be made when an improvement to navigation cuts off a riparian owner's access to the river (*Scranton v. Wheeler*, 179 U. S. 141; *Gibson v. United States*, 166 U. S. 269) or diverts a navigable stream so that it undercuts the owners' banks. *Bedford v. United States*, 192 U. S. 217. Obviously, that servitude does not cease when adjoining lands are taken. Cf. *Campbell v. United States*, 266 U. S. 368, 371. Therefore, the courts below were clearly correct in restricting petitioners to compensation for damage caused by

raising the river above the ordinary high-water mark.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and presents neither a conflict of decisions nor a question of general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

NOVEMBER 1940.